In the Supreme Court of the United States

OCTOBER TERM, 1946

SPRECKELS SUGAR REFINING COMPANY, plaintiff in error,

v.

PENROSE S. MCCLAIN, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

No. 167

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

SPRECKELS SUGAR REFINING COMPANY, plaintiff in error,
v.
PENROSE A. MCCLAIN, COLLECTOR OF internal revenue for the first district of Pennsylvania.
No. 103.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case embraced two common-law actions against the collector, which were instituted in the State court and removed to the Federal court.

There was a special verdict (Rec., pp. 19–21) based upon testimony taken and documentary evidence (Rec., pp. 9–19).

The circuit court of appeals concurred with the position and reasoning of the circuit court (Rec., p. 35) as to remitting the main question here for

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authoritative decision, and affirmed the constitutionality of the law on the ground that the presumption in favor of its validity had not been clearly confuted. The circuit court was also affirmed as to the questions now remaining, but as to the legality of monthly collections of tax, and solely on that ground, the judgment of the circuit court was reversed and the cause remanded for further proceedings. (Rec., pp. 34–36.) Judge Gray dissented from his brethren on the affirmance as to interest. (Rec., p. 36.) A writ of error was then sued out from this court.

In the circuit court of appeals (p. 29) and this court certain of the original complaints of error (Rec., p. 3) dropped out under the respective decisions below, as indicated, and the errors now alleged (p. 40) challenge the *validity and constitutionality of the law* (I, II) and the action of the court below in sustaining the tax upon *interest and upon rent and wharfage* (II, IV, V).

THE LAW.

Section 27 of the war-revenue act of 1898 (30 Stat., 448) provides as follows:

> That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on

the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars.

ARGUMENT.

As to the points decided against the Government, either in the trial court or the circuit court of appeals, viz, the inclusion of receipts from business transacted before the tax year, but actually received after that year began, receipt from stevedoring and the periodic assessment upon monthly returns instead of annually, the Government not having taken a writ of error, these matters appear not to be open to examination here. Nor does there seem to be any ground to challenge the initial right of action and the remedy pursued, since the payment appears to have been involuntary and made under protest, and the statutory appeal to the executive was taken. (*Elliott* v. *Swartwout*, 10 Pet., 137, and other authorities as discussed in *De Lima* v. *Bidwell*, 182 U. S., 1; sec. 3226, R. S.; *Assessor* v. *Osborne*, 9 Wall., 567; *Erskine* v. *Van Arsdale*, 15 Wall., 75; *Wright* v. *Blakeslee*, 101 U. S., 174; *James* v. *Hicks*, 110 U. S., 272; *Williams* v. *Reynolds*, 131 U. S., cxi; *Manhattan* v. *Blake*, 148 U. S., 412).

But there *is* a question of jurisdiction in the circuit court of appeals and in this court, and that point and the constitutional question, with the minor questions on the merits, make the present case.

I.

JURISDICTION.

The court is met at the threshold of the case with the question whether it has jurisdiction to consider the writ of error.

The question whether the act is constitutional in the particulars before referred to was raised in the circuit court and passed upon by that court *pro forma*. The circuit court of appeals likewise, on writ of error, perfunctorily considered the constitutional question and upheld the constitutionality of the act. Both courts were evidently reluctant to consider the constitutional question at length, inasmuch as it was understood that the case was destined for this court, where that question would be finally determined.

The applicable provisions of law for consideration in connection with the question of jurisdiction are as follows:

Section 5 of the circuit court of appeals act provides "that * * * writs of error may be taken from the * * * circuit courts direct to the Supreme Court in the following cases: * * * In which the constitutionality of any law of the United States * * * is drawn in question. * * * In any case that involves the construction or application of the Constitution of the United States."

Section 6 provides "that the circuit courts of appeals * * * shall exercise appellate jurisdiction to review by * * * writ of error final

decisions in the * * * circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases * * * arising under the * * * internal-revenue laws, * * * excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision."

Construing these provisions, this court, in the case of *Carter* v. *Roberts* (177 U. S., 496, 500), speaking by the Chief Justice, said:

> When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance. (*Holt* v. *Indiana Manufacturing Company*, 46 U. S. App., 717; 176 U. S., 68; *United States* v. *Jahn*, 155 U. S., 109; *New Orleans* v. *Benjamin*, 153 U. S., 411; *Benjamin* v. *New Orleans*, 169 U. S., 161.) But when the circuit court

> of appeals has acted on the whole case its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891.

In the case of the *American Sugar Refining Company* v. *New Orleans* (181 U. S., 277, 282), the Chief Justice, quoting from *Carter* v. *Roberts* (*supra*), said:

> These observations, perhaps, need some qualification. Undoubtedly where the jurisdiction of the circuit court depends solely on diverse citizenship and it turns out that the case involves the construction or application of the Constitution of the United States; or the constitutionality of the law of the United States, or the validity or construction of a treaty is drawn in question; or the constitution or law of a State is claimed to be in contravention of the Constitution of the United States; the circuit court of appeals may certify the constitutional or treaty question to this court, and proceed as thereupon advised; or may decide the whole case; but language should not have been used susceptible of the meaning that in cases where the jurisdiction below is invoked on the ground of diverse citizenship the circuit court of appeals might decline to take jurisdiction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction. The mere fact that in such a case one or more of the constitutional questions referred to in section five may have so arisen that a direct

> resort to this court might be had does not deprive the court of appeals of jurisdiction or justify it in declining to exercise it.

In the case of *Robinson* v. *Caldwell* (165 U. S., 359), which involved questions as to the construction of a treaty and the constitutionality of an act of Congress, appeals were taken from the circuit court direct to this court and to the circuit court of appeals. The circuit court of appeals determined the case. Mr. Justice Harlan, in delivering the opinion of this court, said:

> As the construction of a treaty made under the authority of the United States and the constitutionality of an act of Congress were drawn in question in the circuit court, this court could have taken cognizance of the case upon the appeal from the circuit court and determined those questions; and having thus acquired jurisdiction of the cause, it could have determined any question of the jurisdiction of the circuit court appearing upon the record, whether certified or not. (26 Stat., 826, c. 517, sec. 5.) But the defendant elected to prosecute also an appeal to the circuit court of appeals, and that court considered and determined the whole case upon it merits.
>
> It was not the purpose of the judiciary act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits both in this court and in the circuit court of appeals. As no question of jurisdiction was certified by the circuit court,

> and as the defendant chose not to await the action of this court upon the appeal to it from the circuit court, but invoked the jurisdiction of the circuit court of appeals upon the whole case, he must be held to have waived his right to any decision here upon his direct appeal from the circuit court.
>
> We are of opinion that the present appeal must be dismissed. After the final decree upon the merits in the circuit court of appeals, this court, under the circumstances stated, could properly take cognizance of the case, in respect of any question involved in it, only upon certiorari.

In view of the above decisions, the Government contends that upon the decision of the circuit court, as a constitutional question had been raised in the case, the plaintiff in error had the option, under section 5 of the circuit court of appeals act, to bring the case directly to this court upon that question; or, under section 6 of that act, to go to the circuit court of appeals upon the whole case. The plaintiff in error elected to adopt the latter course. It was not optional with the circuit court of appeals to decline jurisdiction simply because a constitutional question was involved. It was within the power of the court, however, under section 6, to certify the constitutional question to this court, or to proceed and decide the whole case. The latter, the circuit court of appeals did. Having so acted upon the whole case, this court, under the ruling in *Robinson* v. *Caldwell* (*supra*), had no

jurisdiction to review the judgment of the circuit court of appeals on writ of error.

The cases which may be taken to this court on appeal or writ of error from the circuit court of appeals are those which, by the concluding paragraph of section 6 of the circuit court of appeals act, are not made final in that court by that section and those in which the matter in controversy shall exceed $1,000 besides costs. But this is a case arising under the revenue laws, and such cases are made final by section 6 in the circuit court of appeals. To maintain the contrary, and to hold that any case made final by section 6 in the circuit court of appeals which involves a constitutional or other similar question may be brought through the intermediate court of appeals to this court, is practically to nullify the intention of Congress in establishing that court and to add to the expense and delay of litigation by giving two appeals in the same case, for in almost any case a constitutional question may be raised.

The intention of Congress in passing the act was to relieve the burden of this court and to make the classes of cases mentioned in section 6 final in that court, no matter what questions, constitutional or otherwise, might be involved therein, subject, however, to the right on the part of that court to certify (see *United States* v. *Lee Yen Tai*, 113 F. R., 465; 185 U. S., 213) and by this court to review by certiorari.

In the case of *City of Owensboro* v. *Owensboro Waterworks Co.* (115 F. R., 318, 323), Judge Severens, speaking for the circuit court of appeals for the sixth circuit, said:

> But if the original jurisdiction is founded entirely upon the ground of diversity of citizenship, and a constitutional question becomes involved, the appeal might go to either court. If it should go to the Supreme Court, that court would, of course, decide the whole case; if to the court of appeals, that court might also decide the whole case, or certify the constitutional question to the Supreme Court, and on receiving its answer, decide the case. If it should decide the constitutional question in the first instance, the unsuccessful party might apply for the writ of certiorari under the provision of the sixth section to correct any mistake made by the court of appeals upon the subject. Thus is accomplished the whole scheme by which Congress intended to give to the Supreme Court, by one method or another, appellate power over all constitutional questions.

It is evident that the language of the court in the Carter case, "But when the circuit court of appeals has acted on the whole case its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891," is to be taken in the alternative, that is, that certain classes of cases, i. e., those made final by section 6 of the circuit court of ap-

peals act, in that court, may be reviewed by certiorari; and that other cases, i. e., those which are not final under that section in that court (which would not include revenue cases), and which involve more than $1,000 besides costs, may be reviewed on appeal or writ of error.

If, however, the case is one which should have gone direct to the Supreme Court from the circuit court, under section 5 of the circuit court of appeals act, because it involved a constitutional question, it follows that the Supreme Court has no jurisdiction of the present writ of error, which was sued out to review the judgment, not of the circuit court but of the circuit court of appeals.

In the case of *Loeb* v. *Columbia Township Trustees* (179 U. S., 478, 479), Mr. Justice Harlan, speaking for the court, said:

> It is true that the plaintiff might have carried this case to the circuit court of appeals, and a final judgment having been rendered in that court upon his writ of error, he could not thereafter have evoked the jurisdiction of this court upon another writ of error to review the judgment of the circuit court, for, as said in *Robinson* v. *Caldwell* (165 U. S., 359, 362), "it was not the purpose of the judiciary act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits both in this court and in the circuit court of appeals," although the latter court, before

> disposing of a case which might have been brought here directly from the circuit court, may certify to this court questions or propositions as indicated in the sixth section of the above act. But the plaintiff was not bound to go to the circuit court of appeals, and thereby cut himself off from the right to have this court declare whether the circuit court erred in holding that the State law upon which he relied for judgment was repugnant to the Constitution of the United States.

In *Huguley Manufacturing Co.* v. *Galeton Cotton Mills* (184 U. S., 290, 295), the Chief Justice, speaking for the court, said:

> If after the jurisdiction of the circuit court attaches on the ground of diversity of citizenship, issues are raised, the decision of which brings the case within either of the classes set forth in section 5, then the case may be brought directly to this court; although it may be carried to the circuit court of appeals, in which event the final judgment of that court could not be brought *here as of right*. (*Loeb* v. *Columbia Trustees*, 179 U. S., 472.) * * * The ground on which the jurisdiction of the circuit court was invoked was solely diversity of citizenship, and the record does not show anything to the contrary, so that the decree of the circuit court of appeals can not be regarded otherwise than as made final by the statute.

In *United States* v. *Jahn* (155 U. S., 109, 112), the Chief Justice used the following language:

> It thus appears that the revisory power of this court and of the circuit courts of appeals, under the act, is to be exercised only in accordance with its provisions, and that the circuit courts of appeals exercise appellate jurisdiction under the sixth section in all cases other than those in which the jurisdiction of this court is exercised under the fifth, among which cases are included all revenue cases—that is, cases under laws imposing duties on imports or tonnage or providing in terms for revenue (*United States* v. *Hill*, 123 U. S., 681), which can only come here on the merits on certificate or certiorari.

The Government does not seek to avoid argument on the merits, but believes this writ should be dismissed for want of jurisdiction, and deems it necessary to discuss the jurisdictional aspect, which is peculiarly and always a matter of concern to this court, and which the court has, in many opinions, in different language, declared is not to be ignored. (Per Mr. Justice Harlan in *Continental National Bank* v. *Buford*, decided November 16, 1903.)

But assuming it to be possible that the court nevertheless may conclude to consider the merits, for the general reason expressed in *Pullman's Car Co.* v. *Transportation Co.* (171 U. S., 138, 145)—although it there appeared that the case was one properly in this court by one or other method of review pursued—and in view of the application

by the plaintiff in error for the allowance of a writ of certiorari, which the Government does not oppose, I proceed to discuss the underlying questions.

II.

THE MERITS.

The chief question is the nature of the tax as direct or indirect. The subsidiary questions left in the case are whether, if the tax is an excise and indirect, it should have been levied upon interest from funds and investments and earnings from wharfage and rent as part of gross receipts.

(a) The subsidiary questions.

The claim that the business is not the refining of sugar; the tax on interest; the tax on wharfage and rent.

As part of the underlying claim affecting these minor questions it is asserted that the tax is not justly laid upon the plaintiff at all, because it manufactures rather than refines sugar. It is sufficient to say that under the facts plainly existing in the sugar trade and shown here—the receipt of cargoes of crude sugar and preparing them for sale to meet present market demands and the selling refined sugar accordingly, the admission that refining was incidental to the business, etc.—the manufacturing is only another name for refining, and the latter process is "incident" to manufacture only in the sense that in the abstract the greater includes the

less, the *genus* the species, and refining is merely a particular variety of the various activities of manufacture. "Refining" and "manufacturing" here are equivalent and identical terms, and none the less because, possibly, after refining in the mass the product was further manufactured to suit the market by grading and packing in bulk in barrels or by fashioning first into cubes or loaves or other shapes. It was all the business of sugar refining. I call attention to the plaintiff's corporate title and to the charter granted by the State of Pennsylvania under which it was and is operating. Surely by these *indicia* the corporation itself knew what business it was engaged in.

As to the matter of interest, wharfage, and rent—it is to be observed that the charter (findings of special verdict, Rec., p. 2) provides for incorporation "for the purpose of refining sugar, which will involve the buying of raw material therefor, and selling the manufactured product, and of doing whatever else shall be incidental to the said business of refining."

The property from which these items of income were derived was all part of the capital embarked in the business of sugar refining. It was part of the plant, of the instrumentalities and facilities, by which the business was conducted; or it was the current and reserve funds deposited in bank or invested more or less permanently which constituted or protected the necessary cash and

floating and working capital. Without these things the enterprise could not be a going concern for long; they formed a part of its basis of credit, and were incident to and part of the business. And such income was manifestly, therefore, a liable and computable element in fixing annual value and gross receipts. Because the company was strong, and able to have ample funds and working capital, and to possess large facilities and complete instruments, permitting their profitable use by way of renting to others at times when the company did not need them, is no reason for contending that all these things were not part of the property, embarked in and incident to the business, and producing part of the receipts and income—that they did not properly create an element in the business results upon which the tax was legally based. It would be strange, for instance, if a mercantile appraiser, assessing a grocery business, did not include in arriving at value the cash balance of profit and loss account in the till and receipts from partial or casual rentings of an appurtenant stable and delivery wagons, if those items were revealed.

It is always to be remembered that the company's charter was given to enable it to refine sugar. That is the first and main purpose expressed, and explicitly includes or "involves" (to use the actual term of that instrument) the purchase of raw material, the sale of the manufactured products, and the doing anything and everything else incidental

to the business. Everything which the company did or might do not *ultra vires* was incidental to the business and an integral part of it under the very terms of its right to exist.

I submit that the reasoning of the courts below is conclusive on these points (Rec., pp. 27, 35), and that the learned judge in the circuit court of appeals who dissented as to interest (p. 36) asserted, without convincing or persuasive reasons, the view that interest should be excluded.

The learned counsel for plaintiff in error, supposing a case, contends that an individual who was a banker and a manufacturer in a certain line, who invested as a separate matter his general accumulations, and who also, and as a distinct thing, refined sugar, would not under the law be required as a sugar refiner to pay a tax upon his other and separate receipts; and counsel then seeks to apply this illustration to the present case. But that is not the case here. This corporation was organized to refine sugar. It *may* do several different kinds of business, but that does not appear, and as its only legitimate business under its charter is sugar refining and what is incidental thereto, the several different kinds of business which it is said to do can not be claimed merely to include that of refining sugar. On the contrary, the business of refining sugar includes the other kinds of business which it does, and they are simply incidental thereto. To say otherwise

is to make the less include the greater. In short, there is no such distinct series of entities or capacities in a corporation as is presented in the illustration about the individual banker who also possessed other interests; and this corporation possessed the other interests so far as they are separable at all as merely collateral and subsidiary parts of its sugar-refining enterprise. Although the charter shows that the business involves the buying of the raw material therefor and selling the manufactured product, the argument is advanced that the business of importing the raw material for sugar refining is as distinct when conducted by the corporation as it would have been if it had been conducted by a sugar merchant, for the reason, apparently, that the plaintiff in error might have purchased its raw sugars from an American merchant after the latter had imported the same. But that is a distinction without a difference, and the fact is that this refiner did choose to purchase his raw material abroad and import it, and presumably if it had not done so, would not have owned and maintained wharves. I think the contention of separate business can not be shown, and that the views of the learned courts below are not open to dispute. It is only necessary to see the establishment of this refining company, or of the similar sugar refineries in the harbor of New York, with their appurtenant wharves and shipping facilities, with freighters constantly lying at

them from all parts of the world, bringing, as this plaintiff's own officer and witness shows, only cargoes of raw sugar to the refinery—because the statement is that scarcely any vessels lie at these wharves except such—to be very certain that the wharfage facilities are a necessary part of the business as it is conducted, and receipts from that source, receipts from the business of sugar refining. Of course the various tramp steamers or regular lines bringing such sugars would naturally be navigated under charter parties to third persons who would pay the wharfage; but they transport and deliver the sugar to the plaintiff, and necessarily pay to it the wharfage charges. If that were not so the practical meaning would be that the plaintiff itself owned or controlled the vessels, and then the business of navigation and of operating steamship lines would have been incidental to and part of the business of sugar refining, if, indeed, their existing charter could be so viewed, or had been so framed as clearly to include it.

The United States does not contend that the plaintiff committed any act *ultra vires*, or did what was unlawful, and is not exacting now a share of what might appear to be unlawful gain. The United States merely claims that under the plaintiff's broad and explicit charter powers its wharfage business was part of its sugar-refining business.

The situation as to interest on deposits and dividends from investments is precisely the same,

and the opposing arguments all rest upon the contention that when Congress placed the excise tax upon this particular business it did not intend to tax "any other business nor the receipts therefrom." We find here the suggestion, especially as to rentals, that the tax is one upon the property itself as income, and is illegal, because, being direct, as such it is not apportioned. But it is impossible to pick out casual rentals like this, which are merely part of the natural receipts of this sugar-refining business, and apply with any force the principle of the income-tax decisions applicable to a tax upon income in general from real estate in general or from personal property in general. The route to this result is too circuitous and indirect; in other words, the tax itself is indirect.

Counsel gives another illustration of a banker who also conducts a small sugar refinery, making gross annual receipts from his refinery of $10,000, and from his banking business of, say, $500,000; and then asks the question whether he would be obliged to pay a tax upon $260,000, although in the business of his refining he received but $10,000. This is the same illustration as the initial one, and merely gives a possible case which is at the same time most unlikely and entirely immaterial. As I have said, it makes the less include the greater, the incident rule the substantive thing; for so far as the matter proposed is concerned, it is sugar refining and not

banking, and this is unaffected by the fact that in the individual illustration given the banking business is large and the sugar-refining business small. I am sure that there would be neither difficulty nor unfairness in imposing this sugar-refining tax upon a wealthy gentleman who did a large banking business and among his outside investments owned a small sugar refinery. But I am equally certain that this is a large sugar-refining business, and I presume it is not engaged in the banking business in any sense or to any extent, great or small.

The learned judges below were right, because the requirement of return of gross receipts of certain persons "in their respective business" clearly includes these receipts of these persons in this business, as created under their charter and contemplated in the law. It is not necessary to speculate upon some unknown person doing the specified business and doing numerous other businesses. It is not at all necessary to determine whether in every case, individual and corporate, the respective business includes *all* business transacted of every sort and kind; and obviously from the charter relations and provisions, and from counsel's own illustrations, this corporate case is very different from any supposed individual case.

As to dividends, the record does not show but counsel states that they were necessarily or actually from shares of stock in other sugar-refining companies. He states again that these receipts were in no sense receipts from its sugar-refining

business and can not be so treated. Possibly if the refining company had done no business whatever it would have received such dividends without being subject to a license tax. But then it would have been a bank, or an investment company, or trustee for investors, or some such thing. As matter of fact, it did the business and it was organized and chartered to do the business; and there is certainly an obvious appositeness and "incidental" aspect respecting its refining business in the fact that part of its means and reserve—of the sinews which made it a strong and going enterprise—should have been an interest in other sugar-refining concerns.

As to the learned counsel's authorities—in *People ex rel., etc.*, v. *Roberts* (154 N. Y., 1)—there were two corporations, and one did not do any business at all, but merely received dividends from the other. That case is not applicable; this company is not "an incorporated gentleman of leisure." It is rather an "incorporated gentleman" who is very active—in refining sugar and doing collateral things.

Counsel speaks of the corporations whose stocks are held as *subsidiary corporations;* they are also engaged in sugar refining, which again emphasizes the relation and connection of such receipts with the sugar-refining business of the principal corporation now before the court. And thereupon he invokes certain decisions on the claim that the United States by taxing such receipts is exacting its

excise from these other corporations and not from the stockholder, the Spreckels Company. One of these decisions simply shows that under a law of New York (*People* v. *Albany Insurance Co.*, 92 N. Y., 458) it is not legal to include in a franchise tax measured by dividends for the tax year a large surplus fund earned and acquired before the act went into effect. This case might have been an authority for the decision below adverse to the Government as to earnings made previous to this law but received after its passage, but it is no authority on the point to which it is cited.

Nor is *Bailey* v. *Railroad Co.* (106 U. S., 109) a relevant authority here. That case construed the internal-revenue act of 1864 (13 Stat., 223) in precisely the same way as the New York decision interpreted the law of that State. It can not be maintained that the tax on that portion of the business receipts which is derived from shares of other sugar refining companies is a tax upon those companies. The tax is valid not only as respects receipts from loans and investments from interest-bearing securities, but also as respects dividends from the business of another corporation.

The point about double taxation I submit is untenable. Duplicate taxation is not open to legal objection when it is plainly intended, or when it naturally or unavoidably results from the law. It is too plain for argument that counsel's quotation from Cooley on Taxation contemplates a case where

a particular concrete object of taxation, or identically the same subject of taxation, whether concrete or not, contributes twice to the same burden in one case and not in another of the same class. Here any sugar refiner, individual, firm or corporate, owning such securities would be subject to this portion of the tax. For all it appears, all sugar refiners may be subject to it for this reason. If not, it is merely an accident or incident of this corporation's good fortune, as contrasted with other refiners, that its equipment for and conduct of the business places this slight burden upon it which other refiners not so fortunate do not bear.

It is to be remarked that Cooley also says (pp. 222, 223):

> Now, whether there is injustice in the taxation in every instance in which it can be shown that an individual who has been directly taxed his due proportion is also compelled indirectly to contribute, is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of any such unequal results. It can not be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances * * * "Property," it is said in one case, "is liable in many cases to be taxed twice. * * * Thus, stock in trade may be taxed to the owner while he may be indebted for

> it to many persons, who may be taxed for those debts or the money loaned to purchase it. Real estate may be taxed to a mortgagor in possession while the mortgagee is taxed for the money secured by the mortgage." * * * "The power to tax twice," it is said in another case, "is as ample as to tax once."

From this it is evident that no valid objection can be urged against this tax on the ground that it is double, which in reality it is not. Certainly, so far as it may be thus considered, that effect is merely indirect, remote, and consequential. This contention is sustained by the following additional authorities: The *Delaware R. R. Tax* (18 Wall., 206); *Farrington* v. *Tennessee* (95 U. S., 679); *Sturges* v. *Carter* (114 U. S., 511); *New Orleans* v. *Houston* (119 U. S., 265); *Patton* v. *Brady* (184 U. S., 608); 1 Desty on Taxation, page 203.

Further, on this point it is not especially significant to say, as counsel does, that there is nothing in this act to rebut the presumption that double taxation was not intended. The act certainly contains nothing to avoid that effect, and if it has really supervened, which is to be doubted, it is more accurate to say that any such collateral result operating equally on all who are similarly placed is natural, is reasonably to be contemplated in such a law, is not unjust, and, as in many other tax laws, is unavoidable.

The suggestion in *Bailey* v. *Railroad Co.* (*supra*) approaching this subject merely is that a tax upon a particular year's earnings or business can not reach back to previous years and accumulated profits, when there is no specific authority to levy any further or additional tax. Here there is no such situation as was presented there, wherein one inquiry was whether the tax rested upon the corporation on account of its net profits or upon the income of the stockholder or bondholder, and the losing contention amounted to the claim that the same tax might be both things in succession, one year a tax upon the income of the corporation, and the next upon the same fund as the income of the individual. After all is said it is clear that in this case, assuming the payment of the sugar-refining tax by the subsidiary corporations and the division of net earnings thereafter, the main corporation now in court would certainly not pay the same tax. Even conceding double taxation for argument's sake, it is infinitesimal, considering the dividend on net earnings of the subsidiary corporation as large in relation to their original tax, and considering the relative small proportion which the dividend would constitute in the main corporation's gross receipts.

The decision of Judge Lowell in *Merchants' Insurance Co.* v. *McCartney* (1 Lowell, 447) is like the other cases cited as holding in chief that profits earned previous to the passage of the act could

not be taxed as annual income. Such profits were capital, and not a dividend out of gains and profits. In this case, again, the distinction which I have just endeavored to point out is to be observed, viz., the difference between the tax (on the one hand) upon net income in gross—that is, in the hands of the corporation, obviously repeated by the same tax on the same income after its division in the hands of stockholders; and, on the other hand, a tax measured by the *gross receipts* of a manufacturing corporation which is only in some measure repeated (and in slight measure, if at all) when the share of the first corporation's *net income*, devolving as dividend upon the other corporate owner, is included in its gross receipts from the same kind of business.

(b) The constitutional question.

The tax is an excise and plainly indirect.

This case is manifestly so clear, and the other cases under argument deal with the question so fully, that I need not discuss it *in extensio*.

Patton v. *Brady* is a very recent authority and reviews definitions and comments adversely on a similar argument against the Government there.

The definitions and the opposing argument in that case shows that a tax upon manufacture or the process of manufacture is an excise and indirect.

The court recognizes that excises, or inland impositions, under which the internal-revenue system belongs, do or may reach the goods or

articles themselves, the sale or license to manufacture or sell, dealings in them and consumption of them, and last in enumeration, but first in the natural order as producing the commodities, the process or business of manufacture. In considering the nature of the tax as an excise, it makes no difference how the manufacturing activities are measured in the imposition of the tax. The measure by gross receipts does not avoid the tax nor make it direct. The law says that the tax shall be paid by every person, etc., "carrying on or doing the business of refining petroleum, * * * or owning or controlling any pipe line," etc.

The court further says in *Patton* v. *Brady* that the excise there upon the specific article, tobacco, all manufactured tobacco and snuff, ~~that~~ "is not a tax upon property as such, but upon certain kinds of property, having reference to their origin and their intended use." *A fortiori*, then, a tax which is not upon property at all nor upon all manufacturing or manufacturers, or even all refining and all refiners, but upon a certain variety of refining which produces a single particular article, is not a direct tax. It rests upon an energy rather than upon a thing or the product of a thing.

This is a tax upon the process of production, and in the last analysis is also a tax on consumption. In either aspect it is indirect. It is plain that the ~~evidence~~ incidence shifts.

A brief reference to the scientific view.

The question here is purely constitutional and legal and is eminently practical. (*Nicol* v. *Ames*, 173 U. S., 509.) The economic view could not rule.

But it is perhaps worth while to pursue that point briefly because I think this tax is indirect under the most extreme economical tests.

In early definitions of direct taxes some economists included only taxes on land, while others also included capitation taxes, but never taxes on the profits of money or industry.

Even now, according to political economists, a tax on certain real property is an indirect tax, because its burden may be shifted. (2 Mill's Political Economy, ed. 1864, pp. 429–431; Seligman on Shifting and Incidence of Taxation.) And *per contra* it is said, by certain economists, that various taxes generally regarded as indirect, especially such as rest upon personal industry and the gains of callings, are direct. These two statements show how uncertain the subject is and how the matter shifts with the point of view. (Taxation in American States and Cities, by Professor Ely, pp. 75, 76; Fawcett's Political Economy, p. 477.)

But even the economists would regard as indirect this particular variety of tax upon the gains of a calling, because it rests upon the energies of manufacture and not upon professional receipts or the gains of personal industry.

Justice White, in his dissenting opinion in the income-tax cases, thus refers to the economical distinction:

> These economists teach that the question of whether a tax is direct or indirect, depends not upon whether it is directly upon a person, but upon whether, when so levied, it may be ultimately shifted from the person in question to the consumer, thus becoming, while direct in the method of its application, indirect in its final results, because it reaches the person who really pays it only indirectly.

Indeed, it is evident from the opinion of the court in the *Income Tax cases* (157 U. S., 579), as well as from the comments on it in Mr. Justice White's dissenting opinion on the rehearing (158 U. S., 711), that notwithstanding the abstract economical doctrine in this part of the field, the court regards taxes on all business gains, professional earnings, salaries, etc., from which human activity evolves profit or income without invested capital, as excises and indirect taxes. And the same dissenting opinion concedes that the decision of the court therein leaves the "tariff or impost, excise taxation, and the direct and indirect taxes on the *vital energies* of the country" to be levied under the rule of uniformity and not the rule of apportionment.

I suppose the court intended to indicate, as not following the economists regarding the nature of

taxes on personal industry and professional receipts (however the court may have reckoned with certain early scientific conceptions), that all taxes on the vital energies of the country in the legal sense are indirect; that there are no such taxes which are direct. Here, certainly, we have a case which clearly lies outside both the economic and the judicial classification of direct taxes.

The scope and relevancy here of the recent income-tax decisions.

In the recent *Income-Tax Cases* (157 U. S., 429; 158 U. S., 601) the court declared and decided that—

> In the cases referred to in the opinion of the court in this case, beginning with *Hylton* v. *United States* (3 Dall., 171) and ending with *Springer* v. *United States* (102 U. S., 586), taxes on land are conceded to be direct taxes, and in none of them is it determined that a tax on rent or income derived from land is not a tax on land.
>
> A tax on the rents or income of real estate is a direct tax, within the meaning of that term as used in the Constitution of the United States.
>
> A tax upon income derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the State and its instrumentalities to borrow money, and is consequently repugnant to the Constitution of the United States. (Decision on first hearing.)

On the second hearing of that case the decision was that "what was decided in the Hylton case was, then, that a tax on carriages was an excise, and therefore an indirect, tax" (158 U. S., p. 627); that "taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes;" that "taxes on personal property or on the income of personal property are likewise direct taxes."

These cases thus state the net result of all the decisions holding that certain taxes are direct taxes, and therefore must be apportioned, and admit to that category besides the poll tax specified by the Constitution only four taxes, viz, on land, on the income of land, on personal property in general (but not on a specific article of personal property), on the income of personal property.

Various taxes were held to be indirect before the decision of the income-tax cases, viz: In *Hylton* v. *United States* (3 Dall., 171), a tax on carriages; taxes on expense or consumption; in *Pacific Insurance Co.* v. *Soule* (7 Wall., 433), a tax on the receipts or incomes of insurance companies; in *Veazie Bank* v. *Fenno* (8 Wall., 533), a tax on the amount of notes paid out by State banks; in *Scholey* v. *Rew* (23 Wall., 331), succession taxes; in *Springer* v. *United States* (102 U. S., 586), an income tax on individuals. And since the income-tax decision the court has determined that the following taxes are indirect, viz: In *Nicol* v. *Ames* (173 U. S., 509), a stamp tax on sales at exchanges

or boards of trade; in *Knowlton* v. *Moore* (178 U. S., 41), an inheritance tax; in *Patton* v. *Brady* (184 U. S., 608), an internal-revenue tax on tobacco.

The ground was fully traversed by the court in the income tax cases, which were heard twice and argued fully and elaborately by distinguished counsel. It will serve no useful purpose to carry the court over that ground again at length.

In Mr. Edmunds's argument he indicates very clearly the vital distinction. In arguing that the decision in the Hylton case was error, he states that the court with hesitation said that a tax upon carriages fell over into the region of indirect taxes, which, as everybody described them, were those *which are intended to fall upon the movement of commodities and the voluntary occupations of men* (157 U. S., p. 487)—conveyances and sales, for example, and manufacturing operations.

In response to questions from members of the court, Mr. Edmunds stated the distinction again very clearly. In reply to the question of Mr. Justice Harlan whether he had formulated any "general rule by which we are to determine whether a tax is direct or indirect," Mr. Edmunds replied:

> A direct tax is a tax upon every kind of property and upon every kind of person in respect of himself, or in respect of his property, either in existence or acquired, or to be acquired, and not in respect to his *voluntary calling, pursuit, or acts, as importing*

goods, which he may import or not import as he pleases; not in respect of his being a trader or manufacturer, etc., in all of which cases he is taxed as a consequence of his free choice of business, and in all of which the burden i to some degree moved on, but in respect of things that belong to the existence of property as an entity, a state of physical being. * * *

Mr. Justice BROWN. Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately, while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else?

Mr. EDMUNDS. Yes, sir; that is a much clearer definition than I have given, though I think the whole burden rarely falls on the last man. It is, I think, borne partly by each agent in the movement. (157 U. S., 491, 492.)

He then argues that the income of a man is inseparable from him, is personal, begins and ends with him, and is therefore direct.

Mr. Choate conceded the court's unwillingness to come to the conclusion that an income tax in all its extent levied upon all callings and earnings was a direct tax. His argument, therefore, was confined to the narrower ground (beyond which, in fact, the decisions do not go), viz, that a tax on the direct necessary income of real estate and personal estate is direct when a tax is on the real estate itself and the rent of it or on the bulk of personal property and the income from it. He did

not speak, he says, of the earnings and income from labor and from any calling, trade, profession, or business. He also refers to the antithesis which invokes not the rule of apportionment, but the rule of uniformity when the taxes "operate as an excise or duty upon income derived from *business or work* of any kind," and speaks of the surrender of the taxation power by the States to Congress as to "the imposts, absolutely; the excise and duties on consumable commodities, to a great extent."

The Chief Justice, delivering the opinion of the court, says (p. 558):

> Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes. But a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which can not be avoided, are direct taxes.

In the review of the significant decisions the Chief Justice thus characterizes some of them:

> In *Pacific Insurance Co.* v. *Soule*, the validity of a tax which was described as "upon the business of an insurance company" was sustained on the ground that it was "a duty or excise" and came within the decision in Hylton's case. * * * The decision rested on narrow ground, and turned on the distinction between an excise duty and a tax strictly so termed, regarding the former a

> charge for a privilege, or on the transaction of business without any necessary reference to the amount of property belonging to those on whom the charge might fall, although it might be increased or diminished by the extent to which the privilege was exercised or the business done.

Scholey v. *Rew* was held to be the case of a succession tax which the court said was "'plainly an excise tax or duty' upon the devolution of the estate or the right to become beneficially entitled to the same, or the income thereof, in possession or expectancy." "A succession duty is not a tax upon income or upon property, but upon the actual benefit derived by the individual, determined as prescribed."

The discussion on the Springer case states that the income was not derived in any degree from real estate, but was in part professional and in part interest on Government bonds, and so the tax was held to be an excise or duty, and as such not direct. In noting certain obscurities in the record and opinion in the Springer case, the Chief Justice says:

> A tax on professional receipts might be treated as an excise or duty, and therefore indirect, while a tax on the income of personalty might be held to be direct.

The view of the Chief Justice on all the preceding cases is that they all determined that taxes on land are direct taxes, and that none of them determines that taxes on rents or income derived

from land are not taxes derived from land; and the opinion then proceeds to hold that there is no distinction between a tax on real estate and on the income therefrom.

In Mr. Justice Field's concurring opinion he thus defines direct taxes (p. 588):

> Direct taxes, in a general and large sense, may be described as taxes derived immediately from the person or from real or personal property, without any recourse therefrom to other sources for reimbursement. In a more restricted sense they have sometimes been confined to taxes on real property, including the rents and income derived therefrom.

And the learned justice thus describes excises (p. 592):

> Excises are a species of tax consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them. The taxes created by the law under consideration as applied to [various corporate associations] or to the conduct of any other kind of business are excise taxes, and fall within the requirement, so far as they are laid by Congress, that they must be uniform throughout the United States.

The court points out and substantially approves the rule as stated by Lord Selbourne in *Attorney-General* v. *Reed* (10 App. cas., 141, 144) [a tax

under an act of Parliament giving provincial legislatures the power of direct taxation, under which power a stamp duty was laid by a Quebec legislature], viz, "The question whether it is a direct or an indirect tax can not depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the *ultimate incidence is uncertain*, then, as it appears to their lordships, it can not, in this view, be called direct taxation within the meaning of the second section of the ninety-second clause of the act in question."

The extent of the income-tax decision is indicated in the following passage (p. 635):

> We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on *gains or profits from business, privileges, or employments*, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

The authorities which may be invoked to support the argument that a tax on an incident or function of property is a direct tax upon the property itself, which have been recognized in respect to income from property, are *Brown* v. *Maryland* (12 Wheat., 419, 444) and *Weston* v. *Charleston* (2 Pet., 449). They simply show that

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the States on the one hand can not in any form, directly or indirectly, burden the exercise by Congress of the powers committed to it by the Constitution, and on the other hand can not in any form, directly or indirectly, burden the agencies or instrumentalities employed by the States in the exercise of their powers.

Similarly, in the *Fairbank case* (181 U. S., 283) a tax on a document was held to be under all the circumstances a tax on an export, and the constitutional prohibition in that matter is positive and complete.

Such cases involve the question "whether under the Constitution, if no power existed to tax at all, either directly or indirectly, an *indirect* tax would be unconstitutional." (Mr. Justice White in Income Tax Cases, 158 U. S., 646.)

Opposing counsel grants that as long as the tax is not imposed upon the *rem*, but is required to be paid as a condition or in consideration of a business or privilege, it is an excise tax. He proceeds, however, to argue that Congress is not at liberty to label a direct tax as an excise tax if the assessment is really upon the *rem*, and that the tax here is in fact upon the *rem*. In developing this argument he asks the question, In what respect does a tax upon the receipts from the sale of a thing differ from the thing sold? and gives various illustrations seeking to show that this tax rests upon the *rem* and is therefore unconstitutional.

I do not think I need repeat the argument upon this point. The answer to counsel's question is: In the first place, that even a tax upon the particular thing sold, being just one article of personal property, viz, sugar, "the physical thing," would *not* be a direct tax within the constitutional sense; and in the second place, that a tax upon the sale would not be a tax upon the thing sold; and lastly, that the tax in this case is not even upon the sale as a transaction, which would be indirect, and has often been so held, but is upon the activities and energies involved, the *business* of sugar refining—upon the entire business enterprise, beginning with the initial steps of assembling the raw material, through the particular manufacturing process which refining is, to sale as the ultimate stage of the series.

But whether we look at this larger and integral import of the question, I submit that the tax is constitutional; or whether we regard only the receipts from wharfage, interest and dividends, the tax can not be construed to rest upon wharves, moneys and shares as *res*, and is just as clearly constitutional.

III.

CONCLUSION.

There can be no valid doubt of the right of Congress to select this subject for taxation, of its right so to classify that those "carrying on or doing the business of" refining sugar, whose

gross annual receipts exceed $250,000, shall be subject to pay annually this special excise tax. There can be no doubt that in laying this excise Congress observed the rule of uniformity as held to mean a territorial or geographical uniformity, and, indeed, even the intrinsic uniformity, the "equality of right among all the taxpayers of the same class" which that rule has sometimes been claimed to intend.

I suppose it is true that one ground of the recent income-tax decisions was that incomes in general exist everywhere, and that a tax thereon is therefore fairly apportionable. But can it possibly be contended that the framers of the Constitution meant to subject to the rule of apportionment property or other subjects of taxation, concrete existences or operations, which were absolutely nonexistent in many States? In how many States of this Union is the business of sugar refining carried on? Not many, indeed. The Internal Revenue Bureau report that in only eight States are there any persons, firms, corporations, or companies carrying on this business, viz: New York, New Jersey, Pennsylvania, Massachusetts, California, Louisiana, Montana, and Texas.

The beet-sugar manufacturers were held not to be liable to the tax, on the ground that they were sugar producers and not sugar refiners; that they did not purchase raw sugars for the purpose of refining them, but made sugar directly from the

beets by a continuous process, and there was no refining except as part of this continuous process of manufacture. (T. D., 19831.)

The economic tests which this court has little regarded, or has rejected, may tend to include in direct taxes all those which, however laid, ultimately rest upon persons or property, and can not be shifted, including, besides a land tax and a tax on personal property in general, or on income in general, excises upon specific articles and even upon the receipts from labor and professional and other callings. But this tax even the speculative economists would hold to be indirect because its incidence can be shifted. The operation of the business, the manufacturing industry, is taxed, but the product thereof is sold by the same manufacturer, and in its sale the tax finds a lodgment and is paid by the consumer.

I therefore summarize the Government contentions as follows:

That by and under its charter, and in fact, the plaintiff in error is refining sugar, involving related purposes which the charter defines;

That the tax on interest, wharfage, and rent affecting the results of the business of sugar refining, which are naturally and fairly incidental thereto and a part thereof, was justly laid;

That the tax is distinctly an excise and indirect, and, so considered, it is uniform;

That the tax can not be viewed as direct under the decisions of this court or under any authorities,

judicial or economic, (*a*) because it does not fall upon persons or property or incomes, except in the most remote and indirect sense; (*b*) because it falls upon a calling or occupation or the gains therefrom; (*c*) because it really operates upon the *operation* of an industry, the *exercise* of a right, the *use* of property, upon the business energies or activities; (*d*) because the incidence of the tax can be, and surely is, shifted and passed on, and, while immediately paid by the refiner, is ultimately paid by the consumer.

I submit that the judgment below should be affirmed.

HENRY M. HOYT,
Solicitor-General.

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